

# Book Reviews

## Taking Lefts Seriously

*The Politics of Law: A Progressive Critique.* Edited by David Kairys. New York: Pantheon Books, 1982. Pp. ix, 321. \$22.50.

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In the old days radicals of virtually all hues knew exactly what they thought about the law: It was a tool of the ruling class. Not a subtle theory, but at least until the 1930's and the New Deal it seemed to explain much of what courts and legislatures did and said. And since the chief occupation of radical lawyers until that time was to keep leftists and union activists out of jail, the theory also seemed adequate to their experience. Law was merely a part of capitalism's "superstructure," an epiphenomenon governed by what happened in the "base," the real world of production and economic life. Out of struggle and contradictions within the base, revolutionary change would inevitably occur, and the old superstructure would be toppled. Law, therefore, did not warrant serious theoretical scrutiny.

This orthodox Marxist framework has lost its prophetic value, and its explanatory power has grown remarkably thin. For today's radical lawyers—who do a great many things besides trying to keep people out of jail—the received leftist notions about law generate fruitless doubts and few insights. But a renewal of radical thinking about law is afoot. The Conference on Critical Legal Studies, founded in 1976, embraces a loose-knit school of radical legal academics and lawyer-writers devoted to giving law the kind of intellectual attention that traditional leftist thought denies it.

*The Politics of Law*<sup>1</sup> provides a sampling of the school's initial efforts

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1. THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (D. Kairys ed. 1982) [hereinafter cited by page number only].

and an occasion for a tentative assessment of its promise. This anthology of sixteen essays is addressed to a wide variety of readers, both activists and scholars. One must ask, then, whether the book's various approaches to law promise to illuminate the experience of legal activists and inform their actions more reliably than the inherited stock of radical ideas. And one must also ask how far Critical Legal Studies (CLS) has progressed in developing an alternative framework for studying the interplay of law, politics, and society.

## I.

CLS actually springs from two intellectual traditions, one indigenous to the legal academy, the other foreign. The first is Legal Realism, which bequeathed to CLS scholars its characteristic methods of assailing the classical premise that legal rules, doctrines, and principles can yield determinate results. The second tradition is that of unorthodox, independent, or "neo"-Marxism, which, since the 1920's, has embraced a variety of attempts by European thinkers to reconstruct the orthodox Marxist framework by recovering the anti-positivist, Hegelian strains of Marx's thought and by appropriating the insights of other great social theorists like Max Weber.<sup>2</sup> This tradition has lent CLS a perspective that most practitioners dub "critique," a term meant to signify a theoretical vantage point outside both the legal order and the larger intellectual and social universe in which that order is embedded. By adopting such a "totalizing" perspective,<sup>3</sup> CLS seeks to show that our ways of organizing and understanding the social world, which seem natural and inevitable from within that universe, are nothing but what Blake called "mind-forg'd manacles" when seen from without.

The chief manacle is liberalism—not New Deal politics, but the world view associated with Hobbes, Locke, Smith, and the framers of the American Constitution. "Liberal legalism" is the subsidiary manacle at which CLS aims its blows.<sup>4</sup> Like classical liberal thought generally, "liberal le-

2. THE UNKNOWN DIMENSION: EUROPEAN MARXISM SINCE LENIN (D. Howard & K. Klare eds. 1972) is a useful collection of essays on the twentieth-century Marxists invoked by CLS scholars: Lukács, Gramsci, the Frankfurt School, and Sartre. On Lukács' and the Frankfurt School's engagement with Weber, see D. HELD, INTRODUCTION TO CRITICAL THEORY: HORKHEIMER TO HABERMAS (1980).

3. The seminal definition and example of "totalizing critique" for CLS can be found in R. UNGER, KNOWLEDGE AND POLITICS (1975). In the collection under review, Karl Klare provides a definition and usage more characteristic of the authors represented in the volume and of the neo-Marxian strand of CLS. See pp. 65-67.

4. See R. UNGER, *supra* note 3, at 63-100; Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 783-84 (1983); Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205 (1979); Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness 1937-1941*, 62 MINN. L. REV. 265, 276-77 (1979); Levinson, *Escaping Liberalism: Easier Said Than Done* (Book Review), 96

galism" begins with congeries of atomistic individuals. Somehow, prior to the formation of society, each individual "naturally" has her own private values, goals, and property (at least in her person and capacity to labor). Each is also capable of reason. Reason, however, cannot adjudicate between competing ends or values; they are subjective, arbitrary matters of will and desire. The basic problem for liberal political thought is the Hobbesian one of organizing society and the polity so as to protect each individual in her person and property—in her "rights"—from other potentially stronger individuals. The basic solution is the social contract and the rule of law. The individuals agree to found a state and abide by its laws, and the rule of law thus instituted protects individuals and their property as they set about collaborating and clashing in the pursuit of private ends.

In this manner, liberal political thought divides the social world into a "public" and a "private" realm. Within the private realm, individuals are "autonomous" and relations "voluntary." It is the realm of "freedom"; public intervention is "coercive." Liberalism also separates "law" and "politics." Politics, which is ruled by will, consists of clashing, irremediably subjective interests and conceptions of the common good. Law stands above and apart from politics and is governed by reason. That is why the rule of law can hold out its dual promise of mediating between the public sovereign and private rightholders and among rightholders themselves. And that is why liberal legalism comes to rest on the assurance that when courts say what the law means, their judgments are based on a distinctive and objective method unsullied by the values and interests—the politics—of those who judge.<sup>5</sup>

Legal Realism is commonly thought to have unhinged this assurance. Realism attacked the prevailing dogmas of rule formalism and conceptualism, contending that, under the cloak of conceptualism's "mechanical jurisprudence," the courts were in fact making value or policy judgments. The problem, as the Realists saw it, was that these judgments were not merely concealed but also at odds with an enlightened view of the "public interest." The Realists envisioned a new purposive and fact-sensitive style

HARV. L. REV. 1466, 1466-67 (1983) (reviewing *THE POLITICS OF LAW* (D. Kairys ed. 1982)).

5. Such is the dominant CLS synopsis of "liberal legalism." It is accurate as far as it goes, but, even as a portrait of basic assumptions, it is somewhat static and ahistorical. It rightly highlights the classical bourgeois or possessive individualist, marketplace conception of rights. But it risks trivializing the inner tensions and transformations and the radical potentials engendered within liberal political thought over the past two centuries by liberalism's commitment to the ideals of human liberty and equality. Compare the very different, though also Marxian-inspired, account of liberalism in Baker, *The Process of Change and the Liberty Theory of the First Amendment*, 55 S. CAL. L. REV. 293, 304 (1981) (emphasizing liberalism's "contradictory oppressive and liberating impulses"). See C.B. MACPHERSON, *DEMOCRATIC THEORY: ESSAYS IN RETRIEVAL* 3-76, 143-203 (1973); Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 602 (1983); *infra* p. 1049.

of legal reasoning. The ersatz objectivity of the past would be supplanted by the genuine objectivity of judicial and administrative policymaking informed by the social sciences.<sup>6</sup>

While CLS scholars insist that the "logic" of the Realist assault leaves liberal legalism in shambles, they concede that the Realists' aims were narrower.<sup>7</sup> The mind-forged manacle absorbed Realism, repaired itself by loosening certain joints, and survived more or less intact. CLS scholars have undertaken to carry on the Realists' internal attack on liberal legal discourse, employing Realism's analytic techniques at ever higher levels of generality. Their object is to demonstrate that the indeterminacy, incoherence, and contradictions that Realists exposed in particular doctrinal fields pervade the whole legal framework, its basic images of society, and all its new, as well as old, claims to "objectivity."<sup>8</sup>

At this point, the neorealist strand of CLS joins the neo-Marxian and social theoretical strand. Internal criticism gives way to a critique of law as it is said to figure in social life. The key words are "ideology" and "legitimation," and the endeavor is to describe and explain how the liberal legal order "enforces, reflects, constitutes, and legitimizes"<sup>9</sup> hierarchy and domination of men over women, whites over blacks, and capital over labor.

Roughly speaking, the first part of *The Politics of Law* is taken up with neorealism, while the second and third reflect what the Frankfurt School (the originator of "critical theory") called "ideologiekritik."<sup>10</sup> The essays are uneven; a few apply the newly adopted concepts in a wooden fashion, others do so with great insight. The new emphasis on law as ideology, rather than as a mere instrument, is welcome. But the particular conception of law as ideology that runs almost throughout the book tends to portray law as a Satanic mill churning out nothing but snares, illusions, and false consciousness. This kind of negative critique can be defended as a corrective to the legal academy's complacency and to law's vast powers of mystification. Nonetheless, it falsifies the more complex ways legal ideology actually figures in consciousness and society. And this

6. See E. PURCELL, *THE CRISIS OF DEMOCRATIC THEORY* (1973); Ayer, *In Quest of Efficiency: The Ideological Journey of Thurman Arnold in the Interwar Period*, 23 STAN. L. REV. 1049 (1971); Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 BUFFALO L. REV. 459 (1979); White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999 (1972).

7. See, e.g., pp. 26-29; Klare, Book Review, 54 N.Y.U. L. REV. 876, 878-81 (1979) (reviewing C. KNAPP, *CONTRACT JURISPRUDENCE AND THE FIRST-YEAR CASEBOOK* (1976)); Tushnet, *Post-Realist Legal Scholarship*, 15 J. SOC'Y PUB. TCHRS. L. 20 (1980).

8. See Note, *'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship*, 95 HARV. L. REV. 1669, 1680 (1982).

9. P. 5.

10. See M. JAY, *THE DIALECTICAL IMAGINATION: A HISTORY OF THE FRANKFURT SCHOOL AND THE INSTITUTE OF SOCIAL RESEARCH, 1923-1950* (1973).

form of critique leads paradoxically to a radical theory withdrawn from the politics of law, not engaged in them.

To do justice to CLS's best insights and aspirations, the neo-Marxian legacy needs to be severely reassessed and not merely adopted. Certain of that legacy's central ideas, which several contributors here have embraced, seem to be both flawed theoretical tools and the source of bootless confusion about law's part in imagining and struggling for the good society. Reassessment may begin with the dilemmas that this pioneering book casts up. But, coming to grips with them may require forsaking an apocalyptic, Blakean view of liberal legalism for a more historical one.

## II.

The three neorealist contributions to *The Politics of Law* reflect the achievements and the shortcomings of that strand of CLS. The achievements are most evident in Elizabeth Mensch's shrewd and brilliantly condensed *History of Mainstream Legal Thought*.<sup>11</sup> Mensch's narrative turns on the insight that one can recover certain key features of successive eras of legal thought by examining their strategies for maintaining the separation of law and politics. Since Realism helped inspire this kind of historical "deconstruction," it is no surprise that Mensch offers an appreciative and cogent account of that school. More intriguing is her detached admiration for "classical legal consciousness," the reigning mode of legal thought from the 1880's through the mid-1930's, and the Realists' nemesis. According to Mensch, classical thought "produced a grandly integrated conceptual scheme that seemed, for a fleeting moment in history, to bring coherence to the whole structure of American law, and to liberal political theory in general."<sup>12</sup> Mensch chides those who today cite "classical" cases like *Adair*<sup>13</sup> and *Coppage*<sup>14</sup> "as representing a judiciary determined to impose its own economic biases on the country," for such a characterization "trivializes the underlying power of the classical conceptual scheme."<sup>15</sup>

The motive behind this reevaluation seems fairly clear. The classical scheme represents the classical expression of liberal legalism. Trivializing the scheme also "trivializes the importance of the realist assault that revealed its incoherence," and glosses over the fact that the "basic model" bequeathed by the classics is "with us still."<sup>16</sup> The "post-realist Recon-

11. P. 18.

12. P. 23.

13. *Adair v. United States*, 208 U.S. 161 (1908).

14. *Coppage v. Kansas*, 236 U.S. 1 (1915).

15. P. 26.

16. *Id.*

struction," which spans the 1940's to the present, has salvaged the "bankrupt form" of liberal legalism in large part by

simply conceding a number of key realist insights and then attempting to incorporate those insights into an otherwise intact doctrinal structure. What were once perceived as deep and unsettling logical flaws have been translated into the strengths of a progressive legal system. For example, the indeterminacy of rules has become the *flexibility* required for sensible, policy-oriented decision-making; and the collapse of rights into contradiction has been recast as "competing interests," which are inevitable in a complex, tragic world and which obviously require an enlightened judicial *balancing*. In other words, we justify as legal sophistication what the classics would have viewed as the obvious abandonment of legality.<sup>17</sup>

I do not dispute the descriptive accuracy or the rhetorical force of this passage. I am concerned with the historical judgment implicit in it and throughout Mensch's account of the "Reconstruction" enterprise. In good neorealist style, Mensch has adopted the viewpoint of the classics—particularly the touchstone of formal rationality—to indict the moderns. But her strategy fails to register that much was gained by "what the classics would have viewed as the . . . abandonment of legality." Classical legal thought purchased its intellectual power at the cost of being dogmatic and arrogantly individualistic in a classical nineteenth-century bourgeois manner. As I have noted, its central dogma lay in the putative naturalness and freedom of the "private" sphere of market and property (as well as racial and gender) relations.<sup>18</sup> The grand formalist style of reasoning that accompanied these ideas was wedded to them as form is wedded to content. By "incorporating" Realism, Reconstruction ushered in a new style of reasoning that is more or less divorced from this highly confining dogma. Contemporary "legal consciousness" concedes that its reasons and norms—even its definitions of "public" and "private"—require justification in terms of explicit social and political considerations. "Policy-oriented decisionmaking" confesses the public political nature of legal discourse and, to that extent, always carries an implicit warrant for its democratization.

Even in its "incorporated" form, then, Realism has undermined the wall between legal doctrinal argument and social and political debate. Mensch suggests that incorporation stripped Realism of all its subversive force. But her own observations—and those of other CLS scholars—on

17. P. 29.

18. See *Coppage v. Kansas*, 236 U.S. 1 (1915); *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873).

the indeterminacy and potential reaches of postrealist doctrine refute her. It has become possible to carry remarkably radical ideas and arguments across the border the classics patrolled so much more effectively. Reconstruction opened new vistas for mystification and apologetics, but it also created new openings for those who choose to contest the inequities of the social and political order within—as well as outside—legal discourse.

The two other essays in Part One of this collection suggest another radical turn of the Realist screw. David Kairys' *Legal Reasoning*<sup>19</sup> is a lucid, though somewhat familiar, debunking of the classical claim that formal reasoning from precedent determines the path of law. Kairys shows the manipulability and indeterminacy of precedent and the way judges' social and political values inevitably figure in legal determinations. "Law," Kairys concludes, "is simply politics by other means."<sup>20</sup>

Duncan Kennedy's *Legal Education as Training for Hierarchy*<sup>21</sup> is a brilliant polemic on law school culture. While Kairys has rehearsed the Realist critique of formal legal reasoning, Kennedy, in his discussion of the legal curriculum, carries the critique forward into the realm of contemporary legal thinking, where formal reasoning is always assisted by, and juxtaposed with, the kinds of purposive, policy-oriented reasoning that the Realists championed.<sup>22</sup> In a flamboyant style, Kennedy sets out the conclusions of his several carefully argued studies of this modern discourse.<sup>23</sup> Policy analysis seeks to import neutral, social scientific criteria like "efficiency" to undergird particular regimes of legal rules and secure for them a measure of objectivity. Kennedy has demonstrated that such criteria are no less indeterminate or manipulable than precedent; they can support the most widely disparate rules and results.<sup>24</sup> Likewise, for every social purpose that can be said to define the metes and bounds of a particular doctrine, there exists a contrary but equally plausible purpose that alters the doctrine's boundaries.<sup>25</sup> Thus, neither formal logic, policy, nor purposive analysis can produce a legal reasoning shorn of substantive value choices. Or, as Kennedy provocatively contends, "[t]eachers teach

19. P. 11.

20. P. 17.

21. P. 40.

22. See p. 33; Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982).

23. See, e.g., Kennedy, *supra* note 22; Kennedy, *Cost-Reduction Theory as Legitimation*, 90 YALE L.J. 1275 (1981); Kennedy & Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711 (1980); Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

24. See Kennedy & Michelman, *supra* note 23; Kennedy, *Cost-Reduction Theory as Legitimation*, *supra* note 23.

25. See Kennedy, *Form and Substance in Private Law Adjudication*, *supra* note 23; Kennedy, *supra* note 22.

nonsense when they persuade students that legal reasoning is distinct, as a *method for reaching correct results*, from ethical and political discourse in general."<sup>26</sup>

There is a further step in this internal critique of liberal legalism which Kairys and Kennedy only intimate. As it stands, the critique turns on the liberal definitions of law as the realm of objectivity and reason, and politics as the realm of clashing and arbitrary subjective values and interests. When Kairys declares that "law is simply politics by other means," he risks upholding contemporary liberalism's impoverished notions of reason and politics. Given CLS's aim of opposing hierarchy and domination with democratic community, it seems wise to hold the rule of law to its partiality for reason. Rather than simply disparaging the liberal legal scheme's claim to adjudicate social disputes by way of reason and damning law (and politics) as the unvarnished exercise of arbitrary will, perhaps CLS should assail the assumption that reason's claims are exhausted by formal and policy rationality.

Neither formal nor policy rationality can objectively decide the social issues that inevitably arise in litigation, because the social world does not have the natural, determinate character that liberal legalism projects upon it. The social arrangements that legal discourse and judgments affirm or deny require rational vindication, but they will not yield to the logical coercion of formal rationality, nor to the positive coercion of "science" that policy analysis claims to offer. The legal process must render reasoned adjudications between competing political perspectives, and no transcendent criteria of truth and falsity exist against which to measure such claims. There is rather what Hannah Arendt calls the "supremely political faculty of judgment," a capacity for "representative thinking," taking into account different standpoints.<sup>27</sup> This faculty has its own form of rationality, which Aristotle called "practical reason"<sup>28</sup> and Jürgen Habermas dubs "intersubjective rationality."<sup>29</sup> This form of rational vindication is inherently democratic; its rationality is vouchsafed by undominated intersubjective agreement or consent.<sup>30</sup>

The next step of internal criticism—where liberalism yields up an aspect of its radical potential—might be this: Law legitimates itself by appeal to reason, and yet the reigning modes of legal rationality deliver a

26. P. 47.

27. See Arendt, *Truth and Politics*, in *PHILOSOPHY, POLITICS AND SOCIETY* 115 (P. Laslett & W.G. Runciman eds. 1967).

28. See Wiggins, *Deliberation and Practical Reason*, in *ESSAYS ON ARISTOTLE'S ETHICS* 221-40 (A. Rorty ed. 1980).

29. See J. HABERMAS, *LEGITIMATION CRISIS* 102-13 (1975); Habermas, *Hannah Arendt's Communications Concept of Power*, 44 *SOC. RESEARCH* 3 (1977).

30. Habermas, *supra* note 29.



kind of “objectivity” that is largely sham—and inevitably so. By its own normative lights, the legal order—and the social and economic arrangements it envelops and ratifies—requires a kind of radical democratic reconstruction: a warrenning with public spaces of participation so that law fully partakes of the form of rationality that befits it.

This radical reconstructive route is pursued by Roberto Unger in his splendid essay, *The Critical Legal Studies Movement*,<sup>31</sup> published some time after *The Politics of Law*. Unger contends that the neorealist critique of purposive reasoning has disclosed the extent to which contemporary legal discourse already contains “conflicting tendencies” suggesting “alternative schemes of human association.”<sup>32</sup> He echoes Kennedy when he argues that legal reasoning cannot legitimately lay claim to a rationality “other than the minimal but perhaps still significant potential rationality of the normal modes of moral and political controversy.”<sup>33</sup> But unlike Kennedy or Kairys, Unger goes on to argue that this “looser form” of rationality can nevertheless support a distinctively legal mode and tradition of disputing over the conduct of human affairs. However, the recognition that legal rationality is not distinctive in the ways convention still claims for it demands that “the class of legitimate doctrinal activities must be sharply enlarged.”<sup>34</sup> Doctrinal debate, in other words, cannot dogmatically stop short of the “broader contests among prescriptive conceptions of society” already implicit in it.<sup>35</sup> And, by the same token, legal institutions ought to be transformed to accommodate disputes over the power structures and social hierarchies that constitute the taken-for-granted backgrounds of current legal and political culture.<sup>36</sup>

There is no space here for a separate and full consideration of Unger’s lengthy effort to lend the neorealist critique a “constructive outcome” and CLS in general a dimension of “prescriptive and programmatic thought.” For present purposes, this summary of Unger’s essay suffices to confirm and amplify my initial suggestion. Pressed far enough, the neorealist argument may make legal reasoning yield a case for radical reconstruction. That case is implicit in Kairys’ and Kennedy’s essays, but the neorealist

31. Unger, *supra* note 5.

32. *Id.* at 567-69.

33. *Id.* at 579.

34. *Id.* at 577.

35. *Id.* at 578.

36. Thus according to Unger, the “constructive outcome” of the neorealist critique lies in a new conception of law and its relation to social life. Unger calls this conception “empowered democracy” or “superliberalism,” and he sets out in imaginative detail the kind of institutional reconstruction, the new “branches of government,” the new forms and arenas of legal contest and participation, and the new kinds of rights which comport with this revised conception of law. At the same time, he defends his program of institutional reconstruction by appealing to liberal and democratic norms available within contemporary legal discourse, rendering the imaginative exercise itself an illustration of “expanded doctrine” and “internal development.”

and neo-Marxian strands of their arguments, and indeed of the collection as a whole, converge before the case for reconstruction can unfold.

Conspicuously absent from the collection are any sustained normative or programmatic arguments.<sup>37</sup> If the contributors were old-fashioned Marxists, convinced that the "iron laws" of history were preparing the inevitable revolution, the omission might be no surprise. But they are not, and—given radical lawyers' inescapable engagements with the claims of reason and justice and those of practice (in both its broad and narrower sense)—the omission of such arguments is surprising and troubling. The reason for it, as I have indicated, may lie in certain fairly new-fashioned, New Left notions about law's part in social life.

Kairys' debunking of legal reasoning is animated by the belief that the "myth of legal reasoning" plays a significant role in enlisting people's consent to "existing social and power relations."<sup>38</sup> Likewise, Kennedy impugns "liberal rights theory" as a species of false consciousness, and several other authors organize their critiques around the role of law in legitimating domination and hierarchy.<sup>39</sup> I share the view that law serves a "hegemonic" role, but I am skeptical about whether it does so in quite the fashion that Kairys and other contributors suggest. First, I question whether people in general believe that the judicial process is apolitical and governed by reason. As Edward Thompson has remarked about English law, people "will not be mystified by the first man [or woman] who puts on a wig."<sup>40</sup> People are committed to the "rule of law," but for reasons that will be unshaken by showing them the indeterminacy of rules and precedents or the contradictoriness of liberal rights. They are committed to it because they believe, for sound historical reasons, that the rule of law imposes certain essential constraints on power. Nor are people without a sense of the pitfalls of liberal legalism. They know that law also protects arbitrary power, and their "consent" to the rule of law does not automatically extend to the disparities of power and wealth which law also envelops and sustains. Respecting many of these disparities, I think it more often true than not that poor and working people "submit but do not agree."<sup>41</sup> In sum, popular consciousness about law is, perhaps, contradictory—and in ways that may not be incompatible with the view that certain key aspects of the liberal order ought to be abolished, while others

37. An exception is Richard Abel's essay on torts, pp. 185-200, which attempts to imagine and defend several alternative schemes.

38. P. 5.

39. P. 43 (Kennedy); p. 96 (Freeman); p. 172 (Gabel & Feinman); p. 294 (Polan).

40. E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* 262 (1975).

41. Alan Hyde develops a similar point at greater length and depth in an article that appeared after this Review was written. Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379.

ought to be preserved and extended.<sup>42</sup> The authors here occasionally gesture toward the positive achievements of liberal legalism and liberal democracy but seem reluctant to develop their critical enterprise accordingly. The neorealist strand tirelessly unveils the formal contradictions of liberal legalism, but it appears wedded to a social theory that is not much interested in exploring with equal care the contradictory—good and bad, emancipatory and oppressive—features of law considered as a social and political phenomenon.

### III.

This social theory rests on the notion that law's role in consciousness and society is unavoidably one of "reification" and "false consciousness." It springs from a current of Marxist thought that inspired much of the best theoretical work of the New Left in the 1960's and 1970's. And its gist is that advanced capitalism has produced a "totally administered" and "completely reified" society. In such a society, thinkers like Herbert Marcuse taught the New Left, all apparent forms of opposition—and particularly class conflict—serve only to "reproduce" the existing order. Through corporate and governmental bureaucracies, contemporary society has absorbed the class struggle and rendered it functional.<sup>43</sup>

What is worse, opposition is not only administered from without, it is also deadened from within. "Reification" is meant to capture the estranged nature of lived experience or consciousness under contemporary capitalism. Marx's workers encountered their productive relations and activities as alien things in the form of commodities and capital. Today, all our relations and activities find expression in reified form; therefore, ours is a culture without potential for genuine political opposition and change.<sup>44</sup>

42. See *infra* p. 1056; J. COHEN & J. ROGERS, ON DEMOCRACY 146-83 (1983).

43. See H. MARCUSE, ONE DIMENSIONAL MAN (1964).

44. The concept of reification originates with Georg Lukács and his interpretation of Marx. See G. LUKÁCS, *Reification and the Consciousness of the Proletariat*, in HISTORY AND CLASS CONSCIOUSNESS 83-222 (1971). The Frankfurt School—particularly Adorno, Horkheimer and Marcuse—adopted Lukács' notion of reification, but relinquished the orthodox conviction that the industrial working classes were destined to become the collective historical "subjects" who would usher in revolution. For them, "reification" became an explanation for the extinction of genuine "subjectivity," a theoretical description of a society wherein the springs of radical aspirations—from the labor movement and popular imagination to art and philosophy—have all been frozen by technical rationality, administration, and the "commodity form." See, e.g., T. ADORNO & M. HORKHEIMER, DIALECTIC OF ENLIGHTENMENT (1973); T. ADORNO, *Cultural Criticism and Society*, in PRISMS 19-34 (1967); H. MARCUSE, *supra* note 43. Habermas, the leading contemporary exponent of critical theory, rejects this image of the present as a totally reified world in which radical theory can maintain its integrity only by restricting itself to a negative dialectic and critique. He finds the liberating potential of the present, ironically enough, in the "claim to reason" and democratic process announced in the liberal legal order, but suppressed by the "power constellations" of contemporary capitalism. See Habermas, *A Reply to My Critics*, in J. HABERMAS: CRITICAL DEBATES 221 (D. Held & J. Thompson eds. 1982).

This deeply pessimistic brand of Marxism has inspired outstanding cultural criticism. As a guide to politics and practice, it is precisely what Adorno, its greatest thinker, called it: a "philosophy of despair." It is not surprising, then, that this philosophy has encouraged, or confirmed, a desperate confusion and ambivalence about the role of law in social change or in the good society.

Marxism's functionalist strain, which Marcuse popularized, informs Alan Freeman's essay in this collection. He concludes that the "function" of civil rights law is to "reproduce" and "legitimate" the "existing class structure."<sup>45</sup> This mechanical conclusion does not follow from Freeman's sensitive analysis of the law. Having lit on it, however, he seems recently to have drawn a more general conclusion which is also an echo of "critical theory." To engage in "legal argument and ideology," whatever one's conscious purpose, is inevitably to reproduce the status quo. Therefore, he argues, only "negative, critical activity"—only "delegitimizing" or "trash-ing" existing legal discourse and scholarship—can reveal "the path to a liberated future."<sup>46</sup> The role law may play on the path or afterwards remains obscure.

How does Freeman arrive at his conclusions about the "functional" nature of civil rights law? His critical account of the trajectory of civil rights doctrine from *Brown* to the present is lucid and penetrating. After an initial "Era of Uncertainty" when the law was "preoccupied . . . with extending the scope of antidiscrimination law" and avoided the problem of remedies, Supreme Court doctrine passed into an "Era of Contradiction."<sup>47</sup> In the latter era, the Court formally hewed to traditional legal notions of fault, causation, and a close, logical link between right and remedy, but actually it began to modify all of these notions. It began haltingly to adopt what Freeman calls "the victim perspective"—one which attends to results, remedying present racially oppressive conditions, even when the link between those conditions and a discrete, provable discriminatory act is attenuated. Finally, the Court retreated from this perspective into an "Era of Rationalization." It reasserted the primacy of the traditional notions that previously it had begun to subvert and thereby consolidated civil rights law as a rationalization for the "continued presence of racial discrimination in our society."<sup>48</sup>

According to Freeman, this evolution was no "mere accident resulting from the fortuitous appointment of the Burger Court." We fail to under-

45. P. 106.

46. See Freeman, *Truth and Mystification in Legal Scholarship*, 90 YALE L.J. 1229, 1231 & n.2 (1981).

47. P. 99.

48. P. 97.

stand the inner nature of civil rights law if we think that the "adverse decisions . . . just as easily could have gone the other way." Rather, the "jurisprudence of rationalization" arose because "needs basic to the preservation of the class structure" are somehow embedded in the law, and these "compelled the rejection of the victim perspective."<sup>49</sup>

Freeman's judgment that the chief effect of civil rights law since *Brown* has been to legitimate pre-existing racial and social hierarchies strikes me as somewhat simplistic and ahistorical.<sup>50</sup> Even if one assumes he is right, however, Freeman explains little when he associates this effect with an imputed "need" of capitalist society and then contends that the law has evolved as it has because its functional "role" is to meet this "need."<sup>51</sup> Freeman asserts that "deep structural" imperatives within legal ideology rendered the "adverse decisions" inevitable, but his reading of the doctrinal evolution makes clear that the legal ideology involved was malleable enough to support a quite different evolution. Nothing that Freeman points to within the ideology "compels" the "jurisprudence of rationalization." This jurisprudence seems rather the contingent product of a particular political climate and balance of social forces.

Of course, Freeman is right that the remedial schemes inspired by the "victim perspective" prompted dislocations, apprehensions, and resentment among working class whites. But no deep-seated internal dynamic preordained the law's response. The response arose, in the first instance, because the judges who shaped the law, like the President who appointed them, were disposed to identify with—and exploit—that resentment in a particular fashion.<sup>52</sup> The traditional individualistic categories of legal dis-

49. P. 111. The "needs" Freeman cites are three-fold: (1) "the problem of formal equality," which ensures that lower class whites bear the brunt of any dislocation arising from ambitious remedial schemes; (2) the fact that a focus on oppressive "conditions rather than conduct, and on society rather than individuals, threatens the legitimacy of vested rights"; and (3) the fact that such a focus undermines the "myth of equality of opportunity." Pp. 111-12. Freeman notes that "equality of opportunity" is an ideological mainstay of the class structure and its social inequalities. The notions of merit and objective qualifications for jobs are, in turn, key aspects of the "'system' of equality of opportunity." P. 113. Since *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), which Freeman regards as the central and most radical case of the "Era of Contradiction," pp. 104, 112, raised the specter of wholesale legal scrutiny of job testing, it threatened to subvert the "system" by revealing that such tests are generally "either irrational or meaningless." P. 107. In other words, *Griggs* and the victim perspective in general eroded the legitimacy of the class structure. The law responded, as it "had to," by rejecting that perspective.

50. Such a judgment slights the profound ("delegitimizing") effects which the abolition of legal segregation had on pre-existing racial hierarchies and power relations. It also discounts the ways civil rights law and litigation legitimated broadly based protest and political mobilization on the part of poor black communities. Of course, Freeman's critique of the ways Supreme Court doctrine truncates the social-historical causes and effects of racial domination is not incompatible with these observations. But they do suggest that his historical assessment of "civil rights law" as an ideology abroad in the culture is abstract and one-sided.

51. See A. GIDDENS, *STUDIES IN SOCIAL AND POLITICAL THEORY* 96-129 (1977) (criticizing functionalism as form of explanation in social theory); Hyde, *supra* note 41 (same).

52. The "jurisprudence of rationalization" may be the legal counterpart of what Gary Wills has

course made it easy to articulate the rejection of the victim perspective in the language of legal, and liberal, common sense, but inferring inevitability from ease is rash. Freeman's rashness leads to the devastating conclusion that radical legal activists and scholars must disavow the discourse of civil rights, lest they contribute to the law's "legitimation function."

Once one extricates Freeman's analysis from its ill-suited functionalist framework, a different conclusion seems possible. The emergence of the "victim perspective" illustrates the possibility of an equal protection jurisprudence that engages the actualities of racial oppression. Freeman rightly identifies those other elements of liberal and legal ideology that impede the development of such a jurisprudence, both in popular consciousness and official discourse. To be sure, these notions of formal equality and vested rights lend legitimacy to the class structure, but that does not somehow immunize them from what Unger calls internal transformation.<sup>53</sup>

Such a jurisprudence might demonstrate that the very notions that impede the radicalization of equal protection doctrine and help translate black workers' legal gains into white workers' losses also stand as obstacles to a more truly democratic labor law.<sup>54</sup> The implications of a radicalized equal protection jurisprudence might lead to the conclusion that only some sort of participatory socialist polity would provide an institutional framework adequate to doing justice to the legitimate claims of all parties.<sup>55</sup> This may be what Freeman means when he says that "no genuine liberation or change in the conditions associated with the historical practice of racial discrimination can be accomplished without confronting class structure."<sup>56</sup> But discerning the ways class domination finds support in law must be but a first step.

Freeman should not leave us with the bald injunction to confront class inequality, as though the "class structure" were a concrete fortress that true opponents of inequality could simply dismantle if they were not distracted by the liberal chatter of civil rights. To confront the class structure is to engage the manifold institutions and ideologies wherein class relationships are molded and reproduced, but also contested and modified. Law is one site of these processes. As this society's central normative discourse, law lends legitimacy to inequality, but it does so by dint of its claims to universal equality and fairness and because it registers the strug-

called the "politics of resentment." See G. WILLS, *NIXON AGONISTES* 61-75 (1970).

53. See, e.g., Calmore, *Exploring the Significance of Race and Class in Representing the Black Poor*, 61 OR. L. REV. 201 (1982); Horwitz, *The Jurisprudence of Brown and the Dilemmas of Liberalism*, 14 HARV. C.R.-C.L. L. REV. 599 (1979).

54. See Klare, *The Quest for Industrial Democracy and the Struggle Against Racism: Perspectives from Labor Law and Civil Rights Law*, 61 OR. L. REV. 157 (1982).

55. See Unger, *supra* note 5, at 602-16.

56. P. 97.

gles of dominated groups at the same time that it blunts them. Only by attending to this contradictory process can one begin to account for the ideological contradictions and indeterminacies that enabled the "victim perspective" to emerge in the first place. And by virtue of these qualities, Freeman might continue to elaborate a radical equal protection jurisprudence that confronts class structure at the level of normative discourse.<sup>57</sup> Instead, Freeman's functionalist bias leads him to abandon the terrain of legal-ideological controversy where his and other CLS scholars' contributions are sorely needed.

If Freeman leaves one confused about what part law may play in overcoming inequality and building the good society, Peter Gabel is more forthcoming. In a number of essays, including the one he co-authored for this volume, Gabel has developed the notion that law is a "reified" form of communication.<sup>58</sup> To clothe a person in legal forms is to impose on her a self transformed or "alienated" into a "thing-like function of the 'system.'"<sup>59</sup> Gabel's response is to dispense with law and cease talking about justice and human needs "in abstract legal terms."<sup>60</sup> Since capitalist production gives rise to "alienation," and since law is "only a recast form" of "underlying socio-economic relations," we must focus instead on the production process to create "the possible conditions for a concrete justice."<sup>61</sup>

Gabel has introduced valuable new perspectives into CLS,<sup>62</sup> but certain key formulations of his law-as-reification thesis seem disconcertingly familiar. The idea that talking about justice "in legal terms" is a kind of false necessity imposed by capitalism ultimately rests on the conviction that in the good society—one with transformed relations of production—government will become nothing more than the technical "administration of things."<sup>63</sup> In this view, the state—and therefore, talk of law and rights—exists only because in a class-based society government means ruling over people.<sup>64</sup>

In other words, the argument for "junking" law turns on the treacherous notion that one can rigorously distinguish administering things from governing or ruling people. This notion might have seemed plausible in

57. See Calmore, *supra* note 53.

58. See p. 172; Gabel, *Reification in Legal Reasoning*, 3 RESEARCH L. & SOC. 25 (1980); Gabel, *Intention and Structure in Contractual Conditions: Outline of a Method for Critical Legal Theory*, 61 MINN. L. REV. 601 (1977); Gabel, Book Review, 91 HARV. L. REV. 302 (1977) (reviewing R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977)).

59. Gabel, *Reification in Legal Reasoning*, *supra* note 58, at 28.

60. Gabel, Book Review, *supra* note 58, at 309.

61. P. 176.

62. See Gabel & Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369 (1982-1983).

63. See Engels, *Socialism: Utopian and Scientific*, in *ESSENTIAL WORKS OF MARXISM* 78 (A. Mendel ed. 1961).

64. S. AVINERI, *THE SOCIAL AND POLITICAL THOUGHT OF KARL MARX* 17-40 (1968).

the nineteenth century, but our subsequent experience suggests that all structures of "merely technical" or "economic" administration are also power structures.<sup>65</sup> Thus, it is folly today to believe that even the good society, with its democratic relations of production, would require merely the "administration of things" to coordinate its affairs. This belief assumes that all the various purportedly technical decisions entailed by "administration" would enlist everyone's spontaneous consent. Once we acknowledge that power over people inevitably inheres in such decisions, we must add that the good society would require not merely a framework for coordinating its economic affairs, but also a means to contest and revise that framework's organization, procedures, and results.

Even in the sphere of economic relations, the good society would therefore need institutions much like law-making and adjudication. Having conceded that "administration" entails power structures, we must also confront the problem of legitimating power. Means for contest and revision, while necessary, are not sufficient. Legitimate power arises only from consent, and consent of the active sort that this radical, democratic scheme obviously entails is generated only by citizens participating in a vital, public, political sphere.<sup>66</sup> So, the good society would need measures to secure a sphere or, rather, many "spaces" throughout the society for free and undominated political involvement and deliberation.

Moreover, having enlarged the public realm of participation to embrace productive and economic affairs as well as other now remote decision-making, the good society would also need to secure the private spaces that protect individuals from coerced "involvement" and, thereby, make freedom authentic. It would need to provide what Unger has called "immunity rights,"<sup>67</sup> including those traditional "liberal rights," which ensure personal freedom from external, state, or collective coercion.

Thus, the good society, though grounded in "transformed relations of production," may contain many things that look suspiciously like "law"—not only activities that resemble "legislating" and "adjudication," but also a variety of measures that can only be called "rights." Perhaps then, not all "rights talk" is reducible to an estranged, reified individualism in the manner that Gabel, Kennedy, and others often suggest.<sup>68</sup>

65. See J. HABERMAS, TOWARD A RATIONAL SOCIETY 50-61, 81-122 (1970).

66. See *supra* note 29.

67. See Unger, *supra* note 5, at 599-600.

68. For example, those rights associated with political liberty and those which are inscribed in labor legislation to protect "concerted activities" have historical roots in republican, not liberal, tradition. They do not represent some cultural or legal encoding of society's self-estrangement under capitalism. Rather, they arise from the historical experience of collective struggles for self-determination against various forms of social and political domination. It seems absurd, therefore, to demand that this kind of "rights talk" be "dereified" before it can enter radical theory or culture. See Kennedy, *Critical Labor Law Theory: A Comment*, 4 INDUS. REL. L.J. 503, 506 (1981).



The most compelling aspect of Marxist thought surely lies in its claim to identify the seeds of a possible and better future in the social forms, relations, and conflicts of the present. Yet, as we have seen, it is just that aspect of the Marxian legacy—its emphasis on the “dialectical” and “contradictory” qualities of social phenomena like law<sup>69</sup>—that CLS’s “reification” and “legitimation function” theses seem to lack. This theoretical, and political, deficit also helps to explain why these approaches cannot seem to capture the Janus-faced character of legal ideology as it actually figures in social life. Gabel and Feinman, for example, in their essay on *Contract Law as Ideology* point out that contract law in the nineteenth century “generated a new ideological imagery” of free and equal individuals whose reciprocal obligations in economic life arose from wholly voluntary exchanges.<sup>70</sup> They rightly underscore the “utopian content” of this imagery, but they assume that its sole effect was to “conceal” and “deny” the market’s oppressive character and working people’s “lack of real personal liberty.”<sup>71</sup> Ideological matters are never so one-sided; legal “hegemony” would rarely succeed if they were.

In fact, working people seized on the voluntaristic basis of nineteenth-century contract law to assert and later defend the right to strike. The very emergence of the labor movement hinged on workers’ compelling the legal order and the state to abide by contract ideology. In the 1880’s and 1890’s when the corporate bar and the courts fashioned the labor injunction to curtail the power workers enjoyed by dint of their not entirely illusory contractual freedom, workers, again, invoked contract ideology to justify defiance.<sup>72</sup> This reliance on “liberal legalism” did not prevent many of the same workers from discovering in the “utopian content” of contract law the basis for a critique of wage labor and capital. If the only legitimate form of economic enterprise rested on consensual agreements between freestanding citizens—so the major Gilded Age labor organiza-

In fairness to Kennedy, I should add that while he frequently cites Lukács and declares that “rights talk” is “reified,” he nonetheless rejects the classic premises of the social theory underlying the idea of reification. When Lukács—or Gabel—says that law is reification he means that the various dilemmas of “individual” versus “society” and “freedom” versus “order” that liberal legal thought and doctrine seek to mediate are historically contingent in a specific sense. The dilemmas seem eternal but are really artifacts of *capitalism*. His rejection of “rights talk” notwithstanding, Kennedy clearly seems to think these dilemmas may be less contingent (or intractable in even more complex ways) than the present mode of production. See Kennedy, *supra* note 4, at 211-13, 220-21.

69. For a valuable discussion, see Spitzer, *The Dialectics of Formal and Informal Control*, in *THE POLITICS OF INFORMAL JUSTICE* 167-205 (R. Abel ed. 1982); Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307, 1345-59 (1979).

70. P. 175.

71. P. 177.

72. *E.g.*, *Injunctions Unrespected*, 4 AM. FEDERATIONIST 159 (1897); *Shades of Jeffries*, 1 AM. FEDERATIONIST 12 (1894); 1 AM. FEDERATIONIST 234 (1894) (letter to editor); see J. FREY, *THE LABOR INJUNCTION* (1923); S. GOMPERS, *SEVENTY YEARS OF LIFE AND LABOR* 244-50 (1925).

tions like the Knights of Labor reasoned—then “no genuine freedom of contract” could exist “under the wage labor system.”<sup>73</sup> The nineteenth-century labor movement’s radical goal of a “Co-operative Commonwealth” of worker-owned industries was a counter-hegemonic vision built largely out of the utopian material of contract ideology.<sup>74</sup> Legal ideology penetrates popular consciousness in more complex ways than Feinman and Gabel allow, and both its doctrinal premises, like marketplace freedom, and its “utopian content,” like “liberty” and “equality,” sometimes secure real material and ideological advantages for subordinate groups. One does not come to grips with the “ideological power of the law” unless one also explores these moments of advantage and their reaches and limitations.

Three other historical essays in this collection take different approaches to the interplay of law and social experience. Nadine Taub and Elizabeth Schneider’s *Perspectives on Women’s Subordination and the Rule of Law*<sup>75</sup> charts two centuries of women’s social and legal history. Unlike most of the other essays, theirs concerns the ways law shapes the material world as well as the world of beliefs and ideology. In contrast to Gabel and Feinman, they convey a sense of how the ideological subordination of women in the nineteenth century was bound up with certain tangible historical gains associated with the emergence of “separate sphere” ideology. Finally, Taub and Schneider stand alone among the CLS scholars represented here in their emphasis that theory must respond to the interrogation of empirical evidence and must sometimes remain incomplete historical inquiry.

David Kairys’ useful historical and analytic essay, *Freedom of Speech*,<sup>76</sup> reminds readers that, until the 1920’s, neither federal nor state courts recognized the right of free speech. Cranks, dissenters, abolitionists, anarchists, trade unionists, and socialists spoke and gathered publicly only at the sufferance of government authorities or in defiance of them. Courts offered no protection. Kairys addresses the question of how and why free speech law was transformed. He provides an engaging account of the Wobblies’ “free speech fights” and illustrates well how the right to freedom of speech and assembly became fused with the demand of the labor movement to be free to organize without state and court backed repression. Out of this fusion, which actually occurred over several decades be-

73. G. MCNEILL, *THE LABOR PROBLEM TODAY* 459 (1887); see L. FINK, *WORKINGMEN’S DEMOCRACY: THE KNIGHTS OF LABOR AND AMERICAN POLITICS* 3-37 (1983); W. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age* (1983) (unpublished paper on file with author).

74. Forbath, *supra* note 73.

75. P. 117.

76. P. 140.

ginning in the 1880's, the First Amendment acquired an insistent popular constituency, and the wisdom of accommodating this constituency pressed on the political perceptions and consciences of the judiciary.<sup>77</sup>

Finally, Morton Horwitz's essay on the nineteenth-century private law doctrine of "objective causation" is a finely textured and theoretically informed example of left legal history. Horwitz shows how this doctrine stood at the center of "late nineteenth-century efforts to construct a system of private law free from the dangers of redistribution."<sup>78</sup> He examines the "politics of causation" and the social context of doctrine but, at the same time, provides an illustration of "the relative autonomy of legal ideas."<sup>79</sup> The essay's account of the doctrine's demise is a brief but insightful rendering of how vast social changes like the emergence of corporate capitalism register in the disparate intellectual worlds of science and law, eroding old categories of thought and prompting new ones.

In light of these thoughtful melds of historical research and theoretical construction, it is disconcerting to find the suggestion in Robert Gordon's extremely useful and provocative contribution—*New Developments in Legal Theory*—that CLS would do well to dispense with the whole enterprise of trying to understand law and legal change in terms of "large-scale theories of historical interrelations between states, societies and economies."<sup>80</sup> Gordon's answer to the determinism that mars some of his cohorts' initial attempts at this enterprise is to declare that there are no determining relationships at all between law and social and economic structures. There is nothing useful to be learned by thinking about law in terms of such jumbo "positivist" notions as "class" or the "development of capitalism."

Interestingly, Gordon, like Gabel, relies on the concept of "reification" to underpin his methodological precepts. The nub of Gordon's argument is that what we think of as "society" and "economy" are merely "belief-systems that people have externalized and allowed to rule their lives."<sup>81</sup> Like "law," these are "reifications" that constrain people unable to recognize them as their own creations. So it follows, according to Gordon, that a theory or history that aims at understanding the ostensibly constraining relations between social structure and various human activities such as law is part of the problem and not the solution. The solution is to look "somewhere quite different—in the smallest . . . most ordinary interac-

77. For an insightful examination of why judicial recognition of First Amendment speech rights began in 1918 and not earlier, see Cover, *The Left, the Right and the First Amendment: 1918-1928*, 40 MD. L. REV. 349 (1981).

78. P. 201.

79. Pp. 204-08.

80. P. 290.

81. *Id.*

tions of daily life in which some human beings dominate others and they acquiesce in such domination."<sup>82</sup> In fact, downtrodden people often have a keen practical knowledge of the supposedly opaque, reified process wherein the interactions of everyday life reproduce domination. This knowledge makes for moments of resistance and negotiation; it does not enable them to make the world anew. Precious few of the everyday world's instances of domination and acquiescence are not bound up with certain rather "large scale" and structured asymmetries of power.<sup>83</sup>

Gordon is persuasive in his criticism of positivist social science of both liberal and Marxist hues, and eloquent in defending the view that the social world is created or "constructed." But, by itself, that insight will not suffice. Gordon seems to ignore the fact that one can examine structures like class, the economy, or the state and the ways they impose real constraints on people without assuming that their histories resemble a "natural" evolution or an "inevitable" process closed to human intervention.<sup>84</sup> All of us could be much more fully subject-like participants in the "continuous recreation" of the social world if we did intervene in those structures. And such intervention would be helped by the most careful scrutiny and conceptualization of the object-like, coercive operations of society as it is and law's complex part in these operations.

#### IV.

The essay in this collection with the richest conceptual scheme is surely Karl Klare's admirable *Critical Theory and Labor Relations Law*.<sup>85</sup> Klare offers a framework for exploring the interplay of law and class structure without reducing the former to a "function" or a "recast form" of the latter. He begins instead by pointing out the obvious inadequacy of such formulations—always true but patent in the area of labor relations, where law so clearly contributes to "making American capitalism what it is," rather than merely "reflecting" or "recasting" it. Klare roundly criticizes the kinds of leftist history and theory that seek to explain the contours of labor law in terms of the "needs of capital." Since its inception with the Wagner Act, the modern law of collective bargaining has been "imbued" by workers' collective efforts with "enduring democratic values." To treat it merely as an instrument of capitalist domination is one-sided and wrongheaded.<sup>86</sup>

In certain contexts, Klare emphasizes, the law is vigilant in protecting

82. *Id.*

83. See A. GIDDENS, *CENTRAL PROBLEMS IN SOCIAL THEORY* 49-130 (1979).

84. *Id.*

85. P. 65.

86. P. 66.

workers' rights. In other ways, however, the law suppresses workers' "self-activity" in favor of bureaucratized, administrative means of "processing" workers' grievances. The law also insulates management decisionmaking and command in the workplace by making these the *quid pro quo* of the collective agreement. Taken as a whole, collective bargaining law, by Klare's lights, embodies a very sophisticated but highly confining conception of "industrial democracy," a "powerfully integrated set of beliefs, values, and . . . liberal political assumptions," which the labor movement "or at least much of its leadership" has internalized.<sup>87</sup> As a result, labor has embraced a notion of "what is possible and desirable in the workplace that stands as a barrier to industrial freedom."<sup>88</sup>

Telling people that they have a "false consciousness" of "what is possible" can be enormously liberating, as Robert Gordon's essay eloquently concludes, but only if done with a firm grip on the historical actualities of their situation and a genuine and sympathetic knowledge of their aspirations. Reading this essay, one cannot question Klare's sympathy, and I do not doubt that he is familiar with working class history and experience. But by concentrating so strictly on the "inner logic" of liberal collective bargaining, Klare's approach discounts certain facts about that history and experience that make his invocation of false consciousness seem somewhat dogmatic.

Klare dubs the collective bargaining agreement "the legal form by which organized employees consent to their own domination in the workplace."<sup>89</sup> At the same time, he suggests that this consent is never real in the sense that the true collective nature of organized workers inheres in their rank and file militancy—which is hoodwinked into such consent. With respect to this characterization, two things seem worth noting. First, from the late 1940's through the 1960's, when the "mature" collective bargaining contract evolved, the productivity and profits of the organized sector were expanding. The bulk of organized workers, not merely their leaders, probably understood that they were choosing to pursue what had been, until then, unattainable forms of job security and welfare benefits in exchange for not pressing further on management's "right" to run the enterprise.<sup>90</sup> Second, it is misleading to suggest that the "legal form" of the collective agreement necessarily frustrates workers' aspirations to exercise control over the workplace. It is also somewhat whimsical to imply that "direct action" is always a preferable way to assert and defend workers' control. Workers manage to inscribe in collective agreements provi-

87. P. 73.

88. *Id.*

89. P. 72.

90. See D. BRODY, *WORKERS IN INDUSTRIAL AMERICA* 173-214 (1980).

sions regulating production norms, job boundaries, and the introduction of new work methods according to their will. Most organized workers, understandably, are not averse to contractual rules per se. The critical issue, in terms of their aspirations, may be not the legal form of collective agreements as such, but shop-floor control over grievance procedures and the negotiation of work norms.

I do not imagine that Klare would necessarily disagree with these remarks. They are intended to illustrate the shortcomings of a radical theory that remains fixed on the discourse of labor law. Klare calls for a "radical nonliberal conception of workplace democracy," to be developed "in concrete terms that are related . . . to the actual problems, institutions, and emerging contradictions of industrial life."<sup>91</sup> To gain such concreteness, Klare's theoretical project must engage the ways labor law actually intersects with contemporary workers' struggles and concerns.

A turn toward more concrete, immediate issues would generate practical insights, but that is not the only reason it seems essential. Klare acknowledges that his critique of the repressive "inner logic" of labor law draws much of its theoretical inspiration from an inherited vision of freedom that is simply "inadequate."<sup>92</sup> Rightly chastened by the hideous bureaucratic oppression that has afflicted socialist regimes, this "anti-statist" socialist vision spurns all "institutional arrangements for organized decision making."<sup>93</sup> A critique of labor law animated by this vision risks denouncing contemporary trade unionism and collective bargaining as "bureaucratic domination" without pausing over what Klare calls the "emancipatory strands" within these institutions. Klare stops well short of such a denunciation, but so far he has only underscored the need to proceed in a different and uncharted direction.

Here the practical impulse to connect with immediate issues merges with a theoretical need. Klare's ideal of workplace democracy surely does correspond to actual initiatives on the shop floor and within many unions. These range from union efforts to assert a measure of workers' and community control over capital investment and disinvestment, to insurgent campaigns to democratize union hierarchies, to the pervasive and chronic shop-floor militancy over work norms that disturbs corporate executives and many union officials alike. These initiatives reflect the aspirations Klare's theory seeks to nurture. In his words, they "prefigure" genuine industrial democracy. But none of them could exist without unions, collective bargaining, and legal defenses against arbitrary dismissals. Although, as Klare shows, its dominant tendencies oppose these activities, labor law

91. P. 66-67.

92. P. 84.

93. P. 83.

also contains fragile threads that may support them. Lawyers attached or sympathetic to these initiatives and to insurgent movements have willy-nilly found themselves uncovering and elaborating these threads,<sup>94</sup> or proposing legal reforms which could harbor experiments in democratic control over capital.<sup>95</sup> These intensely practical efforts and the impediments they encounter within corporate, government, and union power structures may provide the context for theory to begin imagining the institutional forms appropriate to a radical conception of workplace democracy.

V.

To conclude, *The Politics of Law* reflects CLS's success at reinvigorating the Realist inheritance and making it available to a new generation of students and activists. As I have noted, in this anthology as in much CLS scholarship, neorealism is wedded to neo-Marxism. This marriage has yielded forceful critiques of the ways contemporary legal doctrine insulates exploitation and vast asymmetries of power and wealth, even as it "protects the rights" of women, blacks, and workers. But, as I have tried to show, the marriage may also hinder the forging of the normative arguments that are needed to support "critique" and inform action. Moreover, the critiques themselves generally share two shortcomings. First, they often speak abstractly of a body of law's ideological effects, but rarely attend to its actual social and political contexts. And second, while these essays rightly underscore the limited and mystifying aspects of "liberal rights talk," virtually all of them leave the latter's positive features unanalyzed.

I have argued that the hindrance and shortcomings spring largely from certain schematic strains of neo-Marxism that several of the authors seem to have adopted. Marxist functionalism tends to assume that those liberal rights, which in various ways benefit subordinate groups, are essentially the "system's" or the "class structure's" means to keep those groups quiet and to keep itself intact. It tends to slight the extent to which these rights remain contested and, conversely, the extent to which their further development may be both a means and a condition for progressive change. The neo-Marxian notion of law as reification, in turn, holds that the legal

94. See, e.g., Atleson, *Work Group Behavior and Wildcat Strikes: The Causes and Functions of Industrial Civil Disobedience*, 34 OHIO ST. L.J. 751 (1973); Lynd, *Investment Decisions and the Quid Pro Quo Myth*, 29 CASE W. RES. L. REV. 396 (1979); Lynd, *Employee Speech in the Private and Public Workplace: Two Doctrines or One?*, 1 INDUS. REL. L.J. 711 (1977); Lynd, *The Right to Engage in Concerted Activity After Union Recognition: A Study of Legislative History*, 50 IND. L.J. 720 (1975).

95. See, e.g., Ellerman & Pitegoff, *The Democratic Corporation: The New Worker Cooperative Statute in Massachusetts*, 11 N.Y.U. REV. L. & SOC. CHANGE 441 (1982-1983); B. BLUESTONE & B. HARRISON, *THE DEINDUSTRIALIZATION OF AMERICA* 231-64 (1982).

order is irremediably bound up with an atomistic, alienating individualism. Legal institutions and processes are a totally estranged, manipulated embodiment of our collective capacities for self-regulation. The vision of a radical alternative that arises from this perspective is not a reconstructed or transformed legal order, but a "withering away" of government and law and, in their place, a communal world of spontaneous social cooperation that has dispensed with the negative restraints on power of liberal legalism. Surely, many CLS thinkers are aware of the flaws and dangers of this vision. Yet, as this book illustrates, the notion of law as reification continues to brood over their work, counseling a theoretical rejection of the reconstructive enterprise and a practical despair about the potentials of legal activism and reform.

I have tried to suggest a number of reasons why this notion is misleading, both as an account of law as it is and as a view of law's part in imagining and struggling for a just society. I have also tried to emphasize a number of points where the authors' considerable insights might support a different view: that the theoretical case for radical democracy can be fashioned from premises and norms available within legal discourse; that legal reform has an essential, if subordinate, part to play in enabling people to "see themselves experimenting in democratic forms";<sup>96</sup> and, finally, that the contradictory character of law and legal institutions creates practical opportunities for contests against the various forms of domination that CLS assails—contests that are never simply determined and are always renewed.

96. See L. GOODWYN, *THE POPULIST MOMENT*, at vii-xxiv (1979).